

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ADELMAN TRUCK PARTS)
CORPORATION,)
Plaintiff,) Case No. 5:17-cv-2598(JRA)
v.)
JONES TRANSPORT and DON JONES,)
Defendants.)

**DECLARATION OF DEFENDANT DON JONES IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant DON JONES hereby declares under penalties of perjury that the following statements are true to the best of his knowledge, information, and belief:

1. I am the Defendant in above-captioned case and, therefore, I am fully knowledgeable regarding the facts and circumstances surrounding it.
2. I am making this Declaration to show why it is appropriate for this Court to grant my request for summary judgment as to liability only.

My Professional History

3. I have been a small businessman in the transportation industry for about thirteen years.
4. For about seven years – up until Fall 2017 – I operated Jones Transport as a sole proprietor. During that time, I have made hundreds of trips from High Point, N.C. to Kansas City, Mo.

5. For about six years before that, I was the co-owner of a business that owned a truck and operated as an independent contractor for FedEx.

6. I have been heavily involved in motor racing in various capacities since about 1970.

7. I worked for the Richard Childress Racing team in the 1980s, during a period in which that team won six Winston Cup championships with Dale Earnhardt as a driver.

8. Finally, for about four years, in the late 1970s and early 1980s, I managed a salvage yard in Florida. As manager of the salvage yard, I regularly fielded inquiries from customers and told customers whether we had parts in stock that would meet their needs.

9. Because of these experiences, I am familiar with the way that motors work as well as the commercial standards and practices in the trucking and salvage industries.

My Decision to Buy a Motor

10. Around the beginning of October 2017, I began having problems with the motor in my truck. The motor was a Caterpillar C-7. The serial number of my motor was WAX51440. The motor was manufactured by Caterpillar in 2007, and it was rated by the manufacturer as capable of 250 horsepower.

11. I decided that I needed to purchase a motor to replace the one that was causing me problems.

12. I decided at the beginning of the process that I would need to purchase an engine that was capable of 250 horsepower, like the one I had been using.

13. I knew from experience that I needed 250 horsepower in order to haul my payload – which was usually about 56,000 pounds – up the Blue Ridge Mountains. In fact, I knew from experience that trying to do so with less than 250 horsepower would be dangerous.

14. I also knew that earlier Caterpillar C7 engines – those manufactured before 2007 – were only capable of 190 horsepower, while later C7 motors were capable of 250 horsepower.

15. An additional reason for purchasing a 250 horsepower C7 motor was that my truck already had the “componentry” that matched a 250 horsepower C7 motor.

16. When I say “componentry,” I mean the other accessories that interface with the motor, such as the computer, the gaskets, etc. A 250 horsepower C7 motor requires slightly different componentry than a 190 horsepower C7 motor requires.

17. Because I already had the componentry that would fit a 250 horsepower C7 motor, I knew that installing one of those would be less expensive than installing a 190 horsepower C7 motor (because that would have necessitated buying new componentry).

My Purchase from Adelman's

18. On the recommendation of someone else in the industry, I called Adelman's to find out if they had any motors in stock that would meet my needs.

19. I called Adelman's on October 11, 2017, and I was connected with an Adelman's sales person named Billy Betz.

20. I briefly explained my situation to Mr. Betz, and I told him the serial number of the motor I had been using.

21. The fact that I told Mr. Betz the serial number of the motor I had been using is very important.

22. As someone who used to manage a salvage yard, I know from experience that companies that make automobiles and automobile parts are constantly updating their products – sometimes even in the middle of a production cycle – and companies often manufacture several different versions of the same part for different purposes.

23. The consequence of this is that it can be difficult for someone who needs a spare part to describe exactly the part he's looking for – and to make sure that he gets a part that is really the equivalent of another part, or that is really compatible with his vehicle.

24. For this very reason, when I managed the salvage yard, whenever a customer asked if we had a certain part in stock, I *always* asked the customer for the serial number of the part he or she was seeking to replace. Once I knew the serial number, I could look up the specifications of the part the customer was trying to replace, even if those specifications had changed several times over a production cycle. And once I knew exactly what the customer was trying to replace, I could

check to see if we had an equivalent part in stock – again, by checking the serial numbers of the parts we had.

25. Based on my lifetime of experience working with automobiles, including my experience managing a salvage yard, it is my understanding that it is standard practice within the auto salvage industry to ask the customer for the serial number of the part he is trying to replace, and then using that information to determine if the salvage yard has an equivalent part in stock.

26. I told Mr. Betz the serial number of the C7 Motor I was seeking to replace, which, again, was WAX51440.

27. Mr. Betz then told me that he had an engine that would meet my needs. His words were, “I’ve got exactly what you need,” or something very close to that.

28. In the context of standard practices for the auto salvage industry, what Mr. Betz was saying when he said, “I’ve got exactly what you need,” was that he had a motor that was the equivalent of the C7 Motor I was seeking to replace – that is, a motor built by Caterpillar in 2007 or later, and that was capable of 250 horsepower.

29. After telling me, “I’ve got exactly what you need,” Mr. Betz then told me that Adelman’s would sell me the motor for \$5,000, plus freight. I accepted, on the understanding that Adelman’s would be sending me a motor that was the equivalent of the C7 Motor I had been using – the one with the serial number WAX51440. Again, based on the standard practices of the auto salvage industry,

this is exactly what any reasonable person in the automobile business would have been expecting, based on the conversation I had with Mr. Betz.

30. I asked Mr. Betz to ship the motor to Bryans Truck Repair Inc in High Point, North Carolina, which was where my truck was located. The owner of Bryans Truck Repair, Lee Bryan, is a mechanic who had done work for me before.

31. Mr. Betz then said I would have to sign Adelman's standard form Purchase Order before the sale could be processed. Later that day, Adelman's faxed me the Purchase Order. It described the item I was buying as a "Caterpillar C-7 Motor." A true and correct copy of the Purchase Order I signed is attached as Exhibit A.

32. Mr. Betz also said that the only kind of payment that Adelman's would accept would be a wire transfer directly to Adelman's bank account.

33. I did not think twice about signing a Sales Order describing the item as a "Used Caterpillar C-7 Motor," because the motor I was seeking to replace *was a* Caterpillar C-7 Motor.

34. That same day, I signed and returned the sales agreement, and arranged to wire \$5,304 to Adelman's bank account.

**Adelman's Delivers a Motor That Is Not Equivalent
to the Motor I Told Adelman's I Was Replacing**

35. When a motor arrived for me from Adelman's at Bryans Truck Repair Inc in High Point, North Carolina ("the Motor"), it came with a Packing Slip that described the Motor as a "Used Caterpillar C-7 Motor, Serial # KAL61215." A true

and correct copy of the Packing Slip that came with the Motor is attached as Exhibit B.

36. The serial number beginning with “KAL” was an immediate red flag to me, since – as I had told Mr. Betz – the motor I needed to replace had a serial number beginning with “WAX.”

37. For one thing, I knew that the KAL motor would be older than my WAX motor. I knew from my years of experience in the world of trucks and motors that Caterpillar began assigning WAX serial numbers to its C-7 motors after it ran out of KAL serial numbers.

38. Second, while Caterpillar did manufacture some KAL motors capable of 250 horsepower, I knew that it was much more common for KAL motors to be capable of only 190 horsepower. (On the other hand, while Caterpillar did manufacture some WAX motors capable only of 190 horsepower, I knew that it was much more common for WAX motors to be capable of 250 horsepower.)

39. As I knew from my days managing a salvage yard, once you know the serial number of a part, it is possible to find out the factory specifications for the part – even if the manufacturer changed certain specifications in the middle of a production cycle or produced multiple versions of a certain part.

40. The day that I received the Motor from Adelman’s, I called Carolina CAT, the local dealer for Caterpillar. I gave the salesperson I talked to the serial number – KAL61215 – and asked for more information about that particular Motor.

Confirming my worst fears, the salesperson told me that the Motor was capable of only 190 horsepower.

41. In other words, Adelman's had just shipped me a Motor that was *not* the equivalent of the motor I was seeking to replace (serial number WAX51440).

42. When Mr. Betz told me, "I've got exactly what you need," he was, in the context of the common practices of the auto salvage industry, saying that he had a Motor that was the equivalent of my WAX51440 motor that he was offering to sell me. In other words, Mr. Betz led me to believe that Adelman's would send me a 250 horsepower motor, then sent me a 190 horsepower motor instead.

43. I do not know if Adelman's lied to me about having a 250 horsepower motor to sell me, or, after I agreed to purchase a motor, Adelman's discovered that it didn't have a 250 horsepower motor, and intentionally concealed the fact that it was sending me a different kind of motor by leaving the serial number off of the Sales Order. But that detail does not matter because, either way, Adelman acted in bad faith.

I Notify Adelman's That The Motor Was Non-Conforming

44. I called Mr. Betz the same day that the Motor arrived at Bryans Truck Repair. I told him that Adelman's had sent me a 190 horsepower motor, rather than a 250 horsepower motor, as Mr. Betz had led me to believe it would be sending.

45. During that phone call, Mr. Betz said that Adelman's did not have a 250 horsepower Caterpillar C-7 Motor in stock. He also told me that my only option,

if I was not satisfied with the Motor, was to return the Motor (at my own cost) for a refund, minus a 20% restocking fee.

46. In the days following that phone call, I had seven additional telephone conversations with Adelman's employees, most of them with either Billy Betz or Carl M. Adelman. As I now knew that either Mr. Betz or Adelman's could not be trusted, I recorded all seven phone calls.

47. My attorney filed an audio CD containing the recordings of all seven telephone conversations early this year, so they are already part of the record in this case.

48. The conversation that appears at Track Two of the CD is important, because it was during this telephone call that Mr. Betz employed unfair and deceptive practices to pressure me into accepting the nonconforming motor.

49. The Court can listen to the audio of the complete conversation itself, but here are the most relevant portions:

Don Jones (“DJ”): That KAL motor, I’m concerned as heck about it, Billy, I’m going to be honest with you. It’s, uh, a KAL motor and a WAX motor are really two different animals. Just, I’m scared to death of the thing. So –

Billy Betz (“BB”): I don’t know who’s telling you they’re two different motors. They’re not two different motors.

DJ: Well, CAT [Caterpillar, Inc.] says that they got different sized wrist pins, and different – steel pistons instead of aluminum pistons, and a different gear set in the front of the motor; one of them’s a coarser, and heavier-duty gear set. He says that it’s a possibility that the ECM [electronic control module] will make it make 250 horsepower, but he can’t guarantee me, number one, that it’ll run right with that ECM, and two, that, uh –

BB: Well I don't know, I mean, it's definitely going to run right, because with your ECM, all the parameters are set for your truck –

DJ: Right, which is at 250 horsepower, as far as the horsepower is concerned.

BB: Right. I've called CAT, I've talked to CAT, they tell me it's only the ECM – with the customer's ECM on – I mean, I've done research on this. I've sold a bunch of them, I've never had a problem.

DJ: I'm hip to what you're saying. Course now, before I called you the first time – well, not the first time – but before I called you being concerned about it being a different motor, I called CAT and, I mean, he – I could read to you what he said. But, it was, like I say, one in – Shoot, let me get it out here so I can tell you exactly what he said [sounds of crumpling of paper]. I don't want to be guessing, by doing it from memory. I'll read to you exactly what he told me. He said the C-7 uses two different pistons, depending on its horsepower. There's a short one, [unintelligible] aluminum piston, for 210 horsepower and lower engines, that incorporates a 1.5 diameter wrist pin. There's a taller, aluminum piston with a 1.811 wrist pin diameter for 230 horsepower and higher versions. Steel pistons used in the smaller engines with 1.5 diameter wrist pins designed with the smaller horsepower applications. Also says, the front gear train of the engine has changed, which includes fewer teeth and more coarse design. Uh, this is so the gear changes can't be interchangeable with the other version. And in addition, the oil pump now produces a higher volume of oil – but, uh – the WAX engine. So, uh – that's pretty major differences, you know what I mean?

BB: Like I said, I've sold numerous of these engines. Never had anybody have a problem. I mean, I was back there when we ran it. That motor runs excellent.

DJ: Right.

BB: I – personally, I don’t think you’re going to have a problem with it.

DJ: Well I, I mean – I’ve got to interchange – uh, well, I mean, it costs me money. And the reason why I said that is that I’m sitting here with the guy installing it for me. It costs me money to change all them accessories off.

BB: [Unintelligible] switching the accessories, I understand that cause you’re never gonna – even if I sent you a WAX, it’s not going to be set up the same as yours. I see it all the time. I can have two freightliners with two [unintelligible] sitting out here [unintelligible] configurations on the motors are different I see it all the time.

DJ: Yeah, well I mean, you know, it’s a bunch of stuff – the starter, the flywheel, all kinds of things.

BB: Oh yeah, because sometimes they put the starter on the other side [unintelligible].

DJ: Yeah. Well, I think it’s on the same side on this one, but it’s an entirely different-looking starter.

BB: Yeah, but your starter will still bolt on.

DJ: On, on the motor you sent me, you say? Yeah, my starter will bolt on, yeah. That’s right. I think my starter will bolt on the motor you sent me. I just – to be honest with you Billy, I’m 70 years old and I don’t want any grief. And of course I’m spending a lot of money, and I dagburn sure don’t want grief. You know what I mean?

BB: No, I understand . . .

DJ: I just uh, I’m not trying to give you a hard time, I just don’t want to –

BB: No, no, no. I’ve sold a bunch of them. I mean, I’ve done – I’ve talked to different CAT guys. They tell me they’re all the same. I mean, I’ve looked up pistons, bore size – nothing has changed in the C-7. So I don’t know – it’s always been [unintelligible], CAT, and Cummins, is

the ones you can do that. If it was Detroit, yeah, I'd agree 100%, because they use different bore size –

DJ: Yeah, well, I've got a friend right now, that's having, uh – he's putting a Cummins engine in a Ford that had a CAT engine in it.

BB: Oh really?

DJ: He paid five grand for what it takes to change it.

BB: Oh, yeah, for the swap kit.

DJ: Yeah – “swap kit” – that's about as good way to say that as any, I guess. But he's thinking he's going to get a cheaper-to-work-on, more efficient engine with the Cummins. I can't – I don't know. I can't say anything about that. I don't know whether it's more efficient, or easier to work on, or – I know they're cheaper to work on. I've had some Cummins engines. They're cheaper to work on, but, uh –

BB: Oh yeah. Yeah, it's definitely cheaper.

DJ: Yeah. But as far as how much better one engine is than the other, I can't really address that.

BB: Right.

DJ: I – I don't have much choice but to go ahead and go through with this, but I sure would hate to think that I'm putting –

BB: I'm going to leave it up to you Don. I mean, as far as - I know it's a good engine, I've run it, I was back there when my engine guy started it. I understand switching the accessories, but I've sold a good 50 of these – KAL, WAX, or the F – what's the other one? [unintelligible] which is military, 330 horse. I've even sold those for the KAL, and I've never had a problem.

DJ: Of course, if you buy it – if I'da bought it from you, and I wanted a 330 or 350 horsepower CAT motor, it

would have been more expensive, too, you know what I mean?

BB: Well, that, and then, if you wanted that much horsepower, then you would have to get that computer [unintelligible] for the parameters to up your truck.

DJ: See, CAT tells me that it's probably interchangeable, but they, uh, raised concerns about whether the life of it will be anyways near as good with that KAL motor, and also that, they say you can be experiencing some problems changing the ECM, that it might not –

BB: I don't understand that part, because I know that when we sell an engine, the customer has to use his ECM, because all your parameters are set.

DJ: Yeah.

BB: Like, why would you spend fifteen, twenty grand to have an ECM [unintelligible] to match your truck when you already have one?

DJ: Yeah. Yeah.

BB: Your truck is not going to know that you're putting a different motor in.

DJ: Yeah.

BB: I don't understand that point. I mean, I've sold a ton of them.

DJ: Well, let me have you do this. Like I say, I'm sitting here with the mechanic that's going to install it. Let me make sure that he doesn't got some questions for you, then I'll let you go. I mean – [unintelligible]

Lee Bryan: [unintelligible] nothing that I know of. Nothing that hasn't been covered.

DJ: He says he doesn't have any questions – and I've got you on speaker, cause I can't hear it if it ain't on a speaker

BB: That's alright.

DJ: He uh, he says he don't have any questions other than what we discussed. Course, he's talked to CAT, and I talked to CAT, too, and coincidentally we talked to the exact same person. He was doing it at the same time I was doing it. So we both –

BB: I went back and I doublechecked with my engine guy. I mean, my engine guy, he built a lot of motors. He told me you're not going to have a problem.

DJ: Well, I'm gonna hope so. See, this motor that I'm taking out has 500,000 miles on it, and, uh, you know, that's the, uh, life expectancy of that motor. You get 500,000 with a small C-7 CAT motor, you've got it.

BB: [unintelligible] If you get on a forum for C-7s – 500,000 is actually good for a C-7.

DJ: Yeah, that's just about the max they say they'll get.

BB: For a well-taken-care-of engine.

DJ: And, of course, you don't know the area down here, but, uh, I come to your area right often, and, coming out of North Carolina, you go through what they call "Black Mountain." It's about seven miles of six-percent grade uphill. When I first got this truck, it would go up that hill – or, mountain – it's a mountain, it ain't a hill – it'd go up that mountain at about 35 miles per hour. It's got down to about 10 miles per hour now, and it's because the motor's getting weak, you know what I mean? It's wore out. And I think if I put something in there that's got 190 horsepower – course, I guess it's going to have 250, if I use my –

BB: Yeah, you have to use your ECM to get to 250 horse. That's where your ECM is set.

DJ: Well, I'll tell you how good I think it runs two or three days after I get it installed, cause I'm going to be going up that mountain. If it goes up that mountain at less than 10

miles per hour, I'm going to say, well, either it ain't making 250 horsepower, or the motor's weak, you know what I'm saying? Cause I know a C-7 will pull it up there about 35 miles per hour, with the load that I haul. And what I pull with this truck – I gross about 56,000, typically. Of course, the truck's plated for eighty, but I can't do that cause it's a single-axel tractor, and I can't haul that kind of weight without being overweight on the drive. So, I haul about the same thing every week, you know, it'll vary from 54 to 56,000 pounds, is about what I haul. So I'll know just as soon as I start up the mountain.

BB: Yeah, I mean – I've sold, I've sold a bunch of them. I mean, I never had any problems. I don't think you're going to have any, but –

DJ: And it's your opinion that, If I'm hearing you right, you're saying there is no differences inside them. I don't know where this CAT guy I'm talking to gets the difference in the wrist pin size and the type, type of piston, and –

BB: No, I've talked to CAT guys that told me C-7s are C-7s. The bore size is the same. There's nothing that's changed in them. I'm just going by what, you know, I've been told.

DJ: Right. Well, I guess I'm going to go through with this, I just dagburn sure don't want to be having – well, let's say I put it in there and the sucker just absolutely don't operate. I might work something out with you, trading it back out with me, but, hell, I still got to pay this cat to put the thing in there. And he might be an old ugly fart but he's going to charge me for another one, you know what I mean? And to take that one back out.

BB: Right, no, I understand. As far as the motor, the way that motor sounded, I'm not worried about the performance of the motor, because I was back there when he run it. But I guess if you have a problem, you guys call in, we'll have to figure something out. I mean, I won't be able to cover the labor, but – we don't cover labor.

DJ: And, from me to you, we're just talking off the cuff here, you don't think it would behoove me to ship this thing back to you and get a WAX motor – you don't think I'd be ahead of the game any to do that?

BB: Well, I don't have a WAX, but no, I don't think you'll be ahead of the game.

DJ: You see what I'm saying. You know, [unintelligible] having to put the motor in there twice, you know what I mean? It's 304 dollars to ship it, and it's a whole lot more money than that to install it.

BB: No, I understand. But I don't have any WAXs, but I mean, I'm going to leave it to you Don. I mean, as far – if you don't want to do it, they're going to hit you for twenty percent return and you got to pay the freight back. If you don't feel comfortable, I mean, I don't have a problem with it.

DJ: Yeah. You see, you realize I'm kind of between a rock and a hard place.

BB: Oh, I understand –

DJ: You know, I mean, 20% restocking fee, and \$304 to ship it back – that's a ton of money, too. So –

BB: No, I understand –

DJ: But again, if I put the thing in and it don't do the job – I don't have a problem believing that it runs good. That's not – I'm not saying that. I'm just saying, is this thing capable of doing what I need it to do?

BB: I mean, I've sold a bunch of these. I mean, I've never had anybody call me and say that it doesn't run, you know, like, as far as horsepower arrangements from [unintelligible?] the computer, I've never got a phone call like that. I sell ten to fifteen motors a week.

DJ: Well of course, you know, I look at you as an engine-selling person kind of like I do a used-car lot guy – I don't believe nothing that you say! [Laughter.] Oh, me.

BB: I understand. I mean, you know, let's put it this way: I don't care if you send it back. I don't make commission, I could care less. If you want to send it back, I mean, they're going to charge you 20% and the freight. I'll resell it. It doesn't matter to me. You know, I try to make my customers happy. I mean, I can't – I'm not a miracle worker, but I mean I don't have any problem selling them.

DJ: Yeah, I'm sure you don't. I mean, you know how I told you we warranted motors when I was running that salvage yard – we guaranteed them not to smoke or run around with sorry women. Of course, if a guy come back and wasn't happy with his motor, unless it was knocking or smoking, you know, I pretty much told him to have a nice day. [Laughter.]

BB: I mean, I'm not worried about smoking, knocking or blowback, cause you know my engine guy checked for all that.

DJ: Yeah, you kind of, I ain't going to say warranted it, but you assured me that, uh – well I guess you kind of did warranty that, that –

BB: Yeah, there's a 30-day warranty, block and crank –

DJ: Yeah, yeah. Alright buddy. Well, I'm gonna – as it stands right now, I'm gonna go ahead and have this guy stick that thing in there. If anything changes, I'll holler at you.

BB: I'll be here.

DJ: Alright buddy, I appreciate it.

BB: Alright Don.

DJ: Bye-bye.

BB: Bye.

50. In short, and as the Court can hear for itself from the CD, Mr. Betz repeatedly tried to convince me that all Caterpillar C-7 motors were exactly the same – in other words, that any C-7 motor can be made to achieve 250 horsepower if the correct electronic control unit is used. I knew from experience that this was not true.

51. Mr. Betz also attempted to use the Sales Order as a bludgeon to force me to keep the nonconforming Motor. In doing so, he repeatedly lied about my legal rights and Adelman's legal duties under the Sales Order.

52. For one thing, Mr. Betz said that I could only return the nonconforming motor if I paid to ship the motor back and if I agreed to a 20% "restocking fee." Mr. Betz kept insisting that my only option, apart from that, was to keep the nonconforming Motor.

53. The Sales Order *does* include an "Exclusive Remedies" clause. But my Exclusive Remedies were quite different than what Mr. Betz described . . . or, frankly, than what Adelman's attorneys have repeatedly described to this Court. In fact, the Exclusive Remedies clause reads:

Seller shall not be liable to buyer . . . for any direct, indirect, special, incidental or consequential damages, whether based on contract, tort, or any other legal theory. Buyer's exclusive remedy relating to the goods shall be limited solely to *either* seller's return of *the purchase amount* upon seller's return of the non-conforming goods *or seller's repair, correction and/or replacement of any of the goods which are defective and/or nonconforming*.

(Emphasis added).

54. In other words, the Exclusive Remedies clause gave me a choice between refund of the *full* purchase price, or replacement of the nonconforming goods.

55. The Exclusive Remedies clause says that, if I chose a refund, I was entitled to the full purchase price. This is inconsistent with the note at the top of the Sales Order, which says, “20% Handling Charge on All Returns.”

56. If the Court listens to the Track Two of the Audio CD, it will hear that I asked about the possibility of replacing the nonconforming KAL motor with a 250 horsepower WAX motor. The Court will also hear Mr. Betz telling me that Adelman did not have a WAX motor in stock.

57. As I told Mr. Betz during the telephone call found on Track Two of the Audio CD, I was between “a rock and a hard place.” After shipping the nonconforming motor back to Adelman at my own expense, and forfeiting \$1,000 as a “restocking fee,” I would not have had enough money left over to buy a 250 horsepower motor from a different used motor dealer.

58. I indicated to Mr. Betz that I would keep the KAL motor, but only under duress.

59. I then instructed my mechanic, Mr. Bryan, to install the Motor.

Mechanic Lee Bryan Installs the Motor and Finds a Large Piece of the No. 4 Piston Lying in the Oil Pan.

60. My mechanic, Lee Bryan, then proceeded to install the KAL Motor into my truck.

61. In addition to his fee, which was more than \$2,600, I also spent about \$265 on componentry such as gaskets that were needed to install a 190 horsepower KAL Motor into my truck. I would not have needed to buy that componentry if I had actually received a 250 horsepower WAX Motor, as Adelman had agreed, because I already had the componentry to match that kind of Motor.

62. After the 190 horsepower KAL Motor was installed, but before I or my mechanic actually ran the motor, Mr. Bryan removed the oil pan from the Motor. The reason he did this was that I already had a different, larger oil pan that worked well with my truck, which I wanted to use instead.

63. When Mr. Bryan removed the oil pan, he found a large broken-off piece of the No. 4 piston, measuring several inches across, lying inside.

64. As someone who has worked with motor vehicles in some form or another for most of my life, I would never attempt to drive a vehicle after a piece of a piston that large had broken off.

65. Again, based on my many years of working in the trucking industry and with motor vehicles generally, I can say with certainty that no reasonable member of my trade would have set off with a large load on a cross-country trip, knowing that that large of a piece had broken off one of the pistons.

66. I told Carl Adelman as much during a phone call on October 24, 2017. The Court can listen to the entire conversation for itself, as a complete recording of it appears as Track Five of the previously submitted Audio CD. This is how the conversation went:

Carl Adelman (“CA”): Hello, is this Dan?

DJ: Don, Don.

CA: Don, it’s Carl Adelman, from Adelman Truck Parts.

DJ: I was just talking about you. [Laughter.] Oh, me. And I, I’ll be honest with you, it wasn’t real good! [Laughter.] Oh, me. How are you this morning, Mr. Adelman?

CA: Good, thanks.

DJ: I just, uh, went over to the shop that’s installing that motor for me.

CA: Uh-huh.

DJ: Have you got – have they already updated you on what we’re talking about here, or do I need to get you up to speed –

CA: No, I pretty much know the story.

DJ: Okay. I went over to that shop, and of course, the guy called me yesterday afternoon. The motor – the truck was due to be ready to go this morning, and I – He told me late yesterday afternoon, he told me that – He said, I’ve got bad news, and of course, it obviously was. But, uh, I went over this morning –

CA: Well, not obvious to me. You explain the story to me, and I’ll see if I can help sort it out.

DJ: Okay.

CA: It’s not obvious at all.

DJ: Okay, okay. Uh, well, I don’t know how far back to go. Uh, should I –

CA: Well, here’s the story: We sold it to you as a 190, which – we checked with CAT. You switch your ECM, and you have a 250, correct?

DJ: Right, but you –

CA: Which you knew all about. Which we told you.

DJ: Right, well, it started out, it was to be a replacement for a WAX motor. And it was a KAL motor, which is 190 horsepower. I didn't – I was unaware of the fact it was going to be a KAL motor when I purchased it.

CA: No, the serial numbers are online – he gave you the serial number.

DJ: No, sir –

CA: That's not true.

DJ: No, sir, he didn't. He didn't give me the serial number until I –

CA: Go ahead. Continue on.

DJ: I realized it was a KAL motor when I got it. But, uh, that same day I received paperwork from your shop saying it was a – a Bill of Sale that had KAL motor wrote on it. But what I signed when I purchased it was just C-7 CAT motor. So I didn't realize it was a KAL motor until I got it and then, of course, the paperwork followed later that said it was a KAL motor. But there's significant difference between a KAL 190 horsepower motor, and a 250 WAX motor.

CA: Okay.

DJ: And we discussed, extensively, the difference between a KAL motor and a WAX motor, and, of course, I was hoping for a six or seven model WAX motor that was – and I'm going to use the term, "drop-in." And I understand what Billy's telling me. A drop-in's not necessarily, uh, to the full extent, a drop-in motor. Some of the accessories will have to be changed, and of course, we done that. But, uh, one of the things that was different about that KAL motor is, it's got a shallow oil pan. Another difference in 'em is they make less oil pressure. So we was just going to use the oil pan off of my motor,

which is, you know, a good oil pan. We took the oil pan off, and there's a piece of the piston laying in the oil pan, off of the motor that I received.

CA: Well, as soon – I never – as soon as someone tells me that, it never is true.

DJ: Well, what's not true about it? So I can address –

CA: There's never a piece of the piston. Fragments come off. I mean, is the size of one-tenth of my fingernail? Or –

DJ: No, sir, it's about the size of your big toe.

CA: Did you send me a picture of it?

DJ: Well, I'm – I was just getting ready to do that when I called. When I said I was talking about you, that's just what I was talking about.

CA: Okay.

DJ: I've got it laying right here in front of me, on my desk. It's about, I'm going to guess, an inch-and-a-quarter long by an inch tall with a piece of, probably, the size of your little finger – fingernail – that's the second part. And I've got pictures. Now, the pictures looking up into the cylinder are – you really have to, almost – When you look at them, you'll probably have to call me and let me help you discern what you're looking at there. But, uh, it's obvious that this piece broke off of it.

CA: Mm-hmm. We started the motor. It ran excellent. It's out of a bus – matter of fact, we drove the bus from Cincinnati, which is about 200 miles from here.

DJ: Right. Right. I know exactly where you're at, and Cincinnati, but –

CA: The guy putting this motor in for you, he doesn't want to put this used motor in. I can tell you right now, I've been in business 44 years, I know this story like a book.

DJ: Well, let me correct you on that. It's already in the truck, so it ain't that he don't want to put it in. That's not got anything to do with it.

CA: Did you ever, maybe just start it, and run it? And see how it is.

DJ: Well –

CA: If it's bad, you'll pull it out and give it to me, and I'll give you your money back. Maybe it'll be a good motor.

DJ: Well let me –

CA: Might even be perfect –

DJ: Well let me ask you this –

CA: – if you run it.

DJ: Let me ask you this: Would you run a motor with a piece of the piston laying in the oil pan? That was –

CA: It sounds, to a layman, who isn't a motor guy, like me, it sounds erroneous.

DJ: Well define – define what's erroneous to you, that's what I'm trying to get at.

CA: I'm just saying, maybe just – it's in the truck – maybe just test the truck and drive it for a day. See how it is.

DJ: Alright, then, I do that, and it seems to run fine, like –

CA: Then you and I will both know the same – I mean, if it runs good, and it does a good job for you, for what I charge, it's probably good, you know. But if you have a problem with the motor, sure, we're gonna correct it for you. Absolutely.

DJ: Well just – be aware – let me give you a little of my history.

CA: Okay, sure.

DJ: I worked in Winston Cup stock car racing most of my life.

CA: Mm-hmm.

DJ: And I would not run a motor from one end of my driveway to the other end of my driveway with a one by one – one-and-a-half by one inch piece of the piston that came out of the oil pan. In other words, the whole thing is clean, now, but I wouldn't put that oil pan on it and run it from one end of my driveway to the other end. And I most certainly make a 3,000-mile trip with it – with a piece of the piston off. Because I can – I can assure you – and you're not talking to someone who doesn't know anything about motors. You're talking to somebody who knows something about motors, you're saying you are. You would not trust that motor to make a 3,000-mile trip. I –

CA: I'm just saying, it's in the truck, maybe just run it.

DJ: Well –

CA: And then you'll tell me what it's like. You'll know by then.

DJ: Well, I'm losing \$4,000 a week with it not in the truck, or sitting in the truck over there, trying to decide what we're going to do about it. I'm not going to start from North Carolina to Kansas City – that's where I go every week with that truck. I'm not going to start from North Carolina to Kansas City –

CA: Send the motor back. The crank and block is guaranteed. And, uh, you pay the freight both ways, I'll take the motor back.

DJ: Well, that's not acceptable to me.

CA: Well I don't have to take anything back. The block and crank are good on this engine. And Billy is pretty thorough. I just want to help you. If you don't want the motor, send it back to me. It's not a heavy motor to ship,

but – All I’m saying, I suggest, run that motor, and see how it is. If you have any questions, you’ll pull it out and send it back to me. I just – if you read the invoice, it’s the guar—I mean, we heard it run. It ran as good as a used – Remember, this isn’t a rebuilt motor, it’s a used motor. That’s why my motor’s, what, \$4,500 or \$4,250, not \$15,000, like CAT charges. That’s the difference.

DJ: Well, it’s \$5,000 motor for your price.

CA: [unintelligible] if you’re not satisfied, just send it back to me.

DJ: Well, it’s a \$5,000 motor, your price. It’s \$2,500 to install it. It’ll be \$2,500 to install another motor. I’m not gonna run – I’m not – I’m not gonna run that motor. I’m not gonna leave this gentleman’s shop and make a 3,000-mile roundtrip with that motor, I can tell you right now.

CA: Send the motor back.

DJ: Well –

CA: I’ll give you all your money back, plus freight, cause I’m just gonna sell it to the next guy, and he’ll be – Anybody who puts that in will be more than satisfied [unintelligible].

DJ: Mr. Adelman, that’s not – that’s terribly bad business practices, because if I do that, I’m gonna, in your reviews, I’m gonna write a review that you sent me a motor that was a piece of junk.

CA: Well, I’m giving you your money back. What else do you want? I don’t –

DJ: Well, my money back is \$5,000 I had to pay for the motor; \$30 I had to pay to send you a wire transfer; \$2,500 for installing it; I don’t think it should be the \$2,500 to install it again, but I’m gonna have to pay that \$2,500 again, mind you, but –

BB: Yeah, cause you’re not even willing to try it.

DJ: I don't think no – I don't know how to say this, and I want to be nice about it. As nice as I can say it, I don't believe *anybody* would expect you to run a motor that's got a piece of the piston broke off as big as the palm of my hand. I don't think *anybody* would recommend running that motor. *Any!* I mean, I can run it, but if I run it, and another piece of it breaks off, and it gets in the crank, and it throws the rods out of the side of the motor, and the crank out the bottom of the oil pan, you aint' got nothin' then. In other words, it'll cost *you* more money.

CA: You know, used motors aren't for you, I can tell.

DJ: Welp – a used motor is, but –

CA: Just send it back and move on.

DJ: All the componentry needs to be intact. I mean, if I sent you – if I sold you a motor, and one of the pistons was, uh, sticking through the side of the block, you wouldn't be happy about it, I'm sure.

CA: Nah, but this isn't a rod out the side. It's one that we checked the oil pressure on, we checked it for smoke, it didn't make noises. We drove the bus from Cincinnati here. That's four hours.

DJ: Well, what – what do you think this piece of the piston done – what do you think this piece of the piston done to the cylinder wall?

CA: That's what a used engine is. If you want a [unintelligible] bought it from CAT for fifteen to twenty grand. That's what they charge.

DJ: What would this piece of the piston done to that cylinder wall during that trip from Cincinnati?

CA: I mean, I haven't seen it. If you want to send us the picture, go ahead and send us the picture, I can give you a more thorough answer. I don't know. If you're not satisfied, I just say, send it back. I don't know what to tell you.

DJ: I'm not satisfied, that's the thing.

CA: I'm not charging you the 20%. Your block and crank are good, that's what the guarantee is.

DJ: Well, how can you be assured that the block is good if that piece of the piston was scrubbing up – up and down on that cylinder wall?

CA: Used engines aren't for you, I can tell by your – You need a CAT new engine or a [unintelligible]. [10:59]

...

[12:23] You're not even trying the motor.

DJ: Well, I can't fathom the fact that you want me to try a motor that I know is already messed up.

CA: Well, that's your opinion. It's not my opinion. It drove in a bus here and ran excellent. I [unintelligible], I don't know what else – This is what a used motor *is*. You assumed that you were getting more than a good – than a used motor.

DJ: Well, I was expecting all the componentry inside the block to be in one piece.

CA: It's not for you, a used engine. You're nitpicking this, and that's what a used engine is. I'm sorry.

DJ: Well, nitpicking is little-bitty things. This big piece of the piston laying here is not a little-bitty thing.

CA: If it's even the piston.

DJ: Well, I *know* it's the piston. I've looked at it! You can look at it when it gets back to you, and you tell me what it came off of. I got a picture of what it came off of. There's no – that's indisputable.

As nice as I can say it, I don't believe anybody would expect you to run a motor that's got a piece of the piston

broke off as big as the palm of my hand. I don't think anybody would recommend running that motor. Any. I mean, I can run it, but if I run it, and another piece of it breaks off, and it gets in the crank, and it throws the rods out of the side of the motor, and the crank out the bottom of the oil pan, you ain't got nothing then.

67. As I pointed out to Mr. Adelman, anyone who knows about how engines work would know a piston in that condition would have badly scraped the cylinder wall while the motor was running. The cylinder wall is part of the block, which, under the Sales Order, was warrantied for thirty days.

68. Indeed, a visual inspection of the cylinder wall showed that it *had* been badly scored. I am attaching a true and correct copy of a photograph I took of the cylinder wall after we discovered this problem as Exhibit C.

69. The scoring on the cylinder walls is important, because when the cylinder wall is badly scored, it is difficult or impossible for the engine to maintain the oil pressure and hold in the compression necessary to make the engine go.

70. Once a cylinder wall – which is part of the engine's block – becomes scored, it is only a matter of time before the engine fails, because as the broken piston continues to scrape against the cylinder wall 2,300 times a minute, the scoring can only get worse.

71. Based on my experience in the trucking industry and my knowledge of motors, I do not believe that any reasonable person in my line of business would have relied on the Motor Adelman shipped me even for a short trip, let alone a cross-country haul.

72. I encourage the Court to listen to Tracks Three through Six of the previously filed Audio CD. Taken together, those telephone calls clearly show that I revoked acceptance of the Motor after I discovered the hard-to-find problems with the piston and the cylinder wall.

73. In any case, when I revoked my acceptance, I was still well within the thirty-day warranty for the engine block. Again, the cylinder wall is part of the engine block.

74. A few months ago, I took the electronic control module (“ECM”) that was attached to the 190 horsepower KAL Motor when it arrived in High Point, NC to a local CAT dealer. I asked the CAT dealer to perform the standard diagnostics on the ECM. A true and correct copy of the results of that diagnostic is attached as Exhibit D.

I Was Damaged by Adelman’s Unfair and Fraudulent Business Practices

75. It is true that Mr. Adelman did eventually agree to refund the full purchase price of the Motor. However, by the time he agreed to do that, I had already spent about \$2,900 to install a motor that was not only the wrong kind of motor but which was also in pieces by the time it arrived in North Carolina. Moreover, I had also lost several thousand dollars of business income by that time.

76. I could not accept the full refund at that time for the same reason that I could not accept the partial refund earlier: Because I would not have been left with enough money to buy another used motor from a different dealer.

77. Adelman's practices have also caused me severe emotional distress. The money I earned through my trucking business had been the primary source of income for my household, which consists of myself, my wife, and my granddaughter. We have been barely scraping by for a year now, and I am worried sick about what will happen to my family. I get so anxious that sometimes I take nitroglycerin to calm myself.

78. I am seventy years old, and I looked for another job that would replace some of my lost income; however, no one would hire me.

79. It is beyond dispute that Adelman's shipped me a 190 horsepower motor, then tried to fool me into thinking that it was capable of 250 horsepower. It is beyond dispute that Adelman's refused to abide by the exclusive remedies clause it included in its own boilerplate contract. It is undisputed that a large piece broke off of a piston, and that it badly damaged the cylinder wall, which is part of the engine block. For these reasons, I respectfully ask the Court to grant my motion for partial summary judgment, as to liability only.

Dated: Thomasville, NC
November 26, 2018



Don Jones